HULETT HARPER STEWART LLP
BLAKE MUIR HARPER, SBN: 115756
KIRK B. HULETT; SBN: 110726
550 West C Street, Suite 1600
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139

Proposed Liaison Counsel for Movants
Westchester Capital Management, Inc. and
Green & Smith Investment Management L.L.C.
[Additional Counsel on Signature Page]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HCL PARTNERS LIMITED PARTNERSHIP, On behalf of Itself and all others similarly situated,

Plaintiff,

-v-

LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, DEAN M. LUVISA, AMIN I. KHALIFA and PRICEWATERHOUSECOOPERS, LLP,

Defendants.

Case No.: 07-cv-2245-BTM-NLS

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF THE MOTION OF CLASS MEMBERS WESTCHESTER CAPITAL MANAGEMENT, INC AND GREEN & SMITH INVESTMENT MANAGEMENT L.L.C. FOR APPOINTMENT AS LEAD PLAINTIFF AND IN OPPOSITION TO THE COMPETING MOTION

DATE: March 28, 2008
TIME: 11:00 a.m.
JUDGE: Hon. Barry Ted Moskowitz
CTRM: 15 (5th Floor)

FRANK CHAREK, Individually and on behalf of all others similarly situated,

Plaintiff,

-v-

LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA,

Defendants.

Case No.: 07-cv-2256-BTM-NLS

[Caption continued on next page]

DEVAY CAMPBELL, Individually and on behalf of all others similarly situated,

Plaintiff,

-v-

LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA,

Defendants.

Case No.: 07-cv-2297-BTM-NLS

I. INTRODUCTION

Westchester Capital Management, Inc. ("Westchester Capital") and Green & Smith Investment Management L.L.C. ("G&S") respectfully submit this memorandum in further support of their motion for consolidation, to be appointed as the Lead Plaintiff and for approval of their choice of counsel as Lead Counsel. Westchester Capital and G&S (hereinafter, the "Westchester Movants") also submit this memorandum in opposition to the one remaining competing motion for lead plaintiff. The Westchester Movants have, by far, the greatest financial interest in the relief sought and satisfy the requirements of Rule 23. Under well-settled law that governs in this Circuit, the Westchester Movants are presumptively the most adequate plaintiffs and should be appointed as Lead Plaintiff promptly so that the consolidated action may proceed.

As the Ninth Circuit has stated unequivocally, the Private Securities Litigation Reform Act of 1995 ("PSLRA") provides "a clear path that the district court must follow in selecting the lead plaintiff." *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002). In making its most adequate plaintiff determination, the PSLRA instructs courts to adopt a presumption that the most adequate plaintiff is the movant with the largest financial interest in the relief sought by the class and that otherwise satisfies the requirements of Rule 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); *Cavanaugh*, 306 F.3d at 730 ("[T]he district court must compare the financial stakes of the various plaintiffs and determine which one has the most to gain from the lawsuit. It must then focus its attention on *that* plaintiff and determine, based on the information he has provided in his pleadings and declarations, whether he satisfies the requirements of Rule 23(a), in particular those of 'typicality' and 'adequacy.'") (emphasis in original and footnote omitted).

Currently before the Court are only two motions for consolidation, appointment of Lead Plaintiff and for approval selection of Lead Counsel.[1] The first is the motion filed by the Westchester Movants who suffered $7,452,997.14 million in losses in connection with their

[1] Recognizing that the Westchester Movants have the largest losses and are presumptively the most adequate lead plaintiff, two sets of movants − the Alaska Electrical Pension Fund and Genesee County Employees' Retirement System, and the Louisiana Municipal Police Employees' Retirement System − have withdrawn their motions to be appointed as the lead plaintiff.

purchases of the securities of Leap Wireless International, Inc. ("Leap") during the relevant time period. The second, and only remaining motion, was filed by the New Jersey Carpenters Pension and Benefit Funds ("New Jersey") with $252,783.22 in losses. There is no dispute that the Westchester Movants have sustained, by far, the largest loss of any movant.[2] In addition to having the largest financial stake in this litigation, as detailed below, the Westchester Movants also prima facie satisfy the typicality and adequacy requirements of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23").

Upon completing the first step of the analysis, designating a presumptive lead plaintiff, the Court then conducts a second inquiry in which members of the class have the opportunity to rebut the chosen lead plaintiff's presumptive status. This presumption may be rebutted upon proof that the presumptively most adequate lead plaintiff – (aa) will not fairly and adequately protect the interest of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). While the Westchester Movants have not yet seen the opposition brief to be filed by New Jersey, it is inconceivable that New Jersey will be able to make a showing sufficient to rebut the presumption that the Westchester Movants are the most adequate Lead Plaintiff.

Therefore, the Westchester Movants respectfully request that the Court grant their motion to be appointed Lead Plaintiff, and approve their selection of Lead Counsel.

---

[2] Details of the transactions in Leap securities made by funds represented by the Westchester Movants were attached in the form of a spreadsheet to the certification filed with their motion. When printed for filing, certain cells in the Excel spreadsheet were not formatted properly for printing purposes and a number of trading dates appeared as a row of "X"s. Attached as Exhibit A to the Declaration of Karin E. Fisch ("Fisch Decl.") filed with this opposition is the same spreadsheet filed previously but with the cells reformatted so that all data are able to be printed. This reprinted chart was provided to counsel for all competing movants who had not yet withdrawn on March 3, 2008.

II. ARGUMENT

A. The Westchester Movants are Presumptively the Most Adequate Lead Plaintiff

1. The Westchester Movants Have the Largest Financial Interest in the Relief Sought

Westchester Capital and G&S are related investment managers with full discretion and control over all investments made by the funds for which they act as Advisers. The Certification of Roy Behren, the Chief Compliance Officer of both Westchester Capital and G&S, states that he has full authority to take all actions on behalf of Westchester Capital and G&S and the funds they advise, including the right to commence legal action and the right to seek to be appointed as a Lead Plaintiff. The Chief Compliance Officer, acting within his authority of behalf of the funds, duly signed a certification stating that he had reviewed a complaint in this action, and is willing to serve as the representative party on behalf of the Class. The certification demonstrates that Westchester Capital and G&S have full discretion and control over all investments made by the funds they advise and that the funds have suffered losses in the amount of $7,452,997.14 in connection with their purchases of LEAP stock.[3]

The PSLRA requires a court to adopt a rebuttable presumption that "the most adequate plaintif . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u 4(a)(3)(B)(iii). Therefore, in accordance with the directives of the Ninth Circuit, this Court must first determine which of the competing movants has "the largest financial interest" in the litigation. *Cavanaugh*, 306 F.3d at 730. Here, the funds advised by the Westchester Movants, with losses of at least $7,452,997.14, overwhelmingly have the

[3] The loss analysis submitted with the Westchester Movants' motion calculated the funds' losses on the 161,900 shares held after the end of the Class Period by using the 90-day look back period average price of $39.31. These shares were subsequently sold and thus actual losses were able to be calculated. Using the actual sale price for the 161,900 shares sold after the end of the Class Period, the Westchester Movants ultimately suffered actual losses of $7,975,794.00 in the various funds that they represent. This information was also provided to counsel for all competing movants and is attached to the Fisch Decl. as Exhibit B.

largest financial interest in this litigation.[4] The losses of New Jersey, at $252,783.22, are miniscule in comparison.

Therefore, since the PSLRA "provides in categorical terms that the only basis on which a court may compare plaintiffs competing to serve as lead is the size of their financial stake in the controversy," the Ninth Circuit instructs the Court not to even consider the other movant's application; rather, it should focus solely on the application of the Westchester Movants. *Cavanaugh*, 306 F.3d at 732 ("The court must examine potential lead plaintiffs one at a time, starting with the one who has the greatest financial interest, and continuing in descending order if and only if the presumptive lead plaintiff is found inadequate or atypical."); *see also Schriver v. Impac Mortg. Holdings, Inc.*, Case No. SACV 06-31 CJC (RNBX), 2006 U.S. Dist. LEXIS 40607 (C.D. Cal. May 1, 2006) (holding that the presumptive lead plaintiff is the one with the largest financial interest in relief sought by the class who otherwise satisfies the requirements of Rule 23); *Zucker v. Zoran Corp.*, No. C 06-04843 WHA, 2006 U.S. Dist. LEXIS 93469, at *7 (N.D. Cal. Dec. 11, 2006) ("In the Ninth Circuit, the test for which plaintiff has the largest financial interest is strictly applied."); *Tanne v. Autobytel, Inc.*, 226. F.R.D. 659, 666-68 (C.D. Cal. 2005) (focusing solely on movant with the largest financial interest and rejecting invitation to engage in a relative inquiry of the various movants); *In re Silicon Storage Tech., Inc.*, No. C 05-0295 PJH, 2005 U.S. Dist. LEXIS 45246 (N.D. Cal. May 3, 2005).

Westchester Capital, with losses of $7,452,997.14, is therefore the presumptively the most adequate Lead Plaintiff, absent a valid showing of atypicality or inadequacy.

2. The Westchester Movants Satisfy Rule 23

Cavanaugh next instructs that the Court must determine whether the movant with the largest financial interest, here the Westchester Movants, has made a prima facie showing of typicality and adequacy under Rule 23. *Cavanaugh*, 306 F.3d at 732. At this preliminary stage, a "'wide

[4] The Westchester Movants did not purchase or hold any Leap shares prior to the beginning of the Class Period therefore their losses are $7,452,997.14 as calculated on either a LIFO ("last in, first out") or FIFO ("first in, first out") basis. In fact, the Westchester Movants held more shares of Leap common stock as of the end of the Class Period than any other movant purchased during the Class Period.

ranging analysis [under Rule 23] is not appropriate' . . . and 'should be left for consideration on a motion for class certification.'" *Autobytel*, 226. F.R.D. at 666 (citations omitted). As long as the Westchester Movants prima facie satisfy Rule 23, they remain the presumptive lead plaintiff.

The Westchester Movants easily satisfy the typicality requirement of Rule 23 at this preliminary stage. A lead plaintiff's claims are typical if they arise from the same course of conduct and the same operative facts that damaged the entire Class. *See Zucker*, 2006 U.S. Dist. LEXIS 93469, at *9-*10. ("The 'typicality' requirement is satisfied when the named plaintiffs have (1) suffered the same injuries as class members; (2) as a result of the same course of conduct; and (3) their claims are based on the same legal issues."); *Ferrari v. Gisch*, 2004 U.S. Dist. LEXIS 26737 (C.D. Cal. 2004) (Typicality requirement is satisfied when claims arise "from the same event or practice or course of conduct that gives rise to the claims of the class members" and are "based on the same legal theory.") (quoting *Baby Neal for & by Kanter v. Casey*, 43 F.3 48 (3d Cir. 1994)); *Slaven v. BP America, Inc.*, 190 F.R.D. 649 (C.D. Cal. 2000) (a party satisfies the typicality standard where his claims stem from the same event or course of conduct as other class members' claims and are based on the same legal theory).

The claims of the Westchester Movants are typical of the claims of the members of the proposed class. As do all members of the class, they assert that certain of Leap directors and high ranking officers violated the federal securities laws by publicly disseminating false and misleading statements, and by failing to disclose material adverse facts about Leap. Further, as did all of the members of the proposed class, the Westchester Movants acquired Leap stock at prices inflated by Defendants' misrepresentations and omissions and suffered damages as a result. Thus, their claims are typical of the claims of the other class members because they arise out of the same course of events and are based on the same legal theory.

Likewise, the Westchester Movants will be an adequate Lead Plaintiff. "[R]epresentation is 'adequate' when counsel for the class is qualified and competent, the representative's interest are not antagonistic to the interests of the absent class members, and it is unlikely that the action is collusive." *Autobytel*, 226. F.R.D. at 667 (citing *In re N. Dist. Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d. 847, 855 (9th Cir. 1982)). *See also Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1233 (9th Cir. 2007) (The adequate representation test "requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel."). Furthermore, a lead plaintiff movant must also have "a sufficient interest in the outcome of the case to ensure vigorous advocacy." *Autobytel*, 226. F.R.D. at 667. Here, there is no evidence of any antagonism between the Westchester Movants and the proposed class members. *See Zucker*, 2006 U.S. Dist. LEXIS 93469, at *10-*11 ("The 'adequacy' requirement is satisfied when the proposed lead plaintiff does not have interests antagonistic to the proposed class."). As detailed in its opening motion and herein, the Westchester Movants assert claims that hinge on the same questions of law and fact as the claims to be pursued by the members of the proposed class, their claims are typical of the claims of the class, and they have taken significant steps to advance this litigation.

Moreover, Westchester Capital is presently the lead plaintiff in a securities class action pending in the Southern District of New York, *Kaplan v. Gelfond*, 240 F.R.D. 88 (S.D.N.Y. 2007), demonstrating that the Westchester Movants have the experience to direct litigation and to ensure adequate representation of a class of investors. Fisch Decl., Ex. C. The Westchester Movants will ensure that the litigation is conducted in the best interests of the members of the class and are not subject to any unique defenses that would render them incapable of adequately representing the class.

Finally, the Westchester Movants have selected and retained counsel highly experienced in prosecuting securities class actions such as this to represent them. The Westchester Movants have selected the law firm of Abbey Spanier Rodd & Abrams, LLP to serve as Lead Counsel and the law firm of Hulett Harper Stewart LLP to serve as Liaison Counsel. These firms have extensive experience in the area of securities litigation and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors.

B. All Other Lead Plaintiff Motions Should be Denied

Recognizing that the Westchester Movants are presumptively the most adequate plaintiffs, two sets of movants have withdrawn their motions. As set forth above, the financial interest of New Jersey in the relief sought by the class is substantially smaller than the financial interest of the Westchester Movants. Therefore, under the PSLRA and *Cavanaugh*, the motion of New Jersey should be denied forthwith.

The burden of rebutting the presumption that the Westchester Movants should be appointed as the Lead Plaintiff lies with New Jersey. Given the clear preliminary showing of adequacy and typicality made by the Westchester Movants, it is difficult to fathom what arguments New Jersey will drum up in order to try to "leap-frog" over the Westchester Movants, especially in light of the very clear process detailed in *Cavanaugh* for making the lead plaintiff determination. *Cavanaugh* unequivocally states that the principal basis of comparison between competing lead plaintiff movants is

> a straightforward application of the statutory scheme . . . provid[ing] no occasion for comparing plaintiffs with each other on any basis other than their financial stake in the case. . . . So long as the plaintiff with the largest losses satisfies the typicality and adequacy requirements, he is entitled to lead plaintiff status, even if the district court is convinced that some other plaintiff would do a better job.

306 F.3d at 731. Further, the *Cavanaugh* court emphasized that PSLRA does not

> authorize the district judge to examine the relative merits of plaintiffs seeking lead status on a round-robin basis. The statutory process is sequential: The court must examine potential lead plaintiffs one at a time, starting with the one who has the greatest financial interest, and continuing in descending order if and only if the presumptive lead plaintiff is found inadequate or atypical.

Id. at 732.

Under the circumstances, the Westchester Movants contend that it would be extraordinarily difficult for anyone to establish that they are inadequate or atypical plaintiffs. To the extent that New Jersey is able to cobble together assertions in that regard, the Westchester Movants will address those assertions in their reply papers.

III. CONCLUSION

For the reasons set forth in its opening motion and herein, the Westchester Movants respectfully request that the Court: (i) appoint Westchester Capital and G&S as Lead Plaintiff in the consolidated Class Action; and (ii) approve their choice of Abbey Spanier Rodd & Abrams, LLP to serve as Lead Counsel and Hulett Harper Stewart LLP to serve as Liaison Counsel.

DATED: March 14, 2008

HULETT HARPER STEWART LLP
KIRK B. HULETT
BLAKE MUIR HARPER

/s/Blake Muir Harper
BLAKE MUIR HARPER

550 West C Street, Suite 1600
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139

Proposed Liaison Counsel for Movants Westchester Capital Management, Inc. and Green & Smith Investment Management L.L.C.

ABBEY SPANIER RODD & ABRAMS, LLP
NANCY KABOOLIAN
KARIN E. FISCH
212 East 39th Street
New York, New York 10016
Telephone: (212) 889-3700
Facsimile: (212) 684-5191

Proposed Lead Counsel for Movants Westchester Capital Management, Inc. and Green & Smith Investment Management L.L.C.